Supreme Court, U.S.
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No. 87-1540

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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VERNON MCKINSEY, LLOYD FERREE, ROBERT CHRONISTER, RUTH MARSHALL AND FRANKLIN HENRY, ALL INDIVIDUALLY AND AS ELECTED OFFICIALS,
*Petitioners,*

v.

WILLIAM C. DONIVAN, BRADLEY J. GOHN, KENNETH L. ADAMS, AND RICHARD K. TROUT,
*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## QUESTION PRESENTED

Whether a member of a municipal governing body who votes on a matter legislative in character can be deprived of the defense of absolute immunity from a federal damages claim because under state procedural law, the act taken should have been accomplished by the passing of an ordinance rather than a vote?

## PARTIES BELOW

Petitioners/Defendants Below

Vernon McKinsey, Lloyd Ferree, Robert Chronister, Ruth Marshall and Franklin Henry are the Petitioners herein and, together with Dallastown Borough, are the Defendants below. At all times relevant hereto, Mr. McKinsey was the Mayor and the other individuals were members of the Dallastown Borough Council of Pennsylvania; collectively, they are referred to herein as "the Council Members."

Respondents/Plaintiffs Below

William C. Donivan, Bradley J. Gohn, Kenneth L. Adams, and Richard K. Trout are Respondents herein and are the Plaintiffs below.[1] Respondents were police officers of the Dallastown Borough police force; collectively, they are referred to herein as "the Police Officers."

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1. The respective spouses of the Police Officers also were party-plaintiffs below. However, their loss of consortium claims were dismissed by the district court; the question presented by the petition is not relevant to their claims.

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*Respondents.*

---

## PETITION FOR A WRIT OF CERIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

---

The Council Members seek a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit in Case No. 87-5409, *Donivan v. Dallastown Borough*, 835 F.2d 486 (3d Cir. 1987).

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 835 F.2d 486 and is reproduced in Petitioners' Appendix ("P. App.") at 1a-8a. The original memorandum and

order of the United States District Court for the Middle District of Pennsylvania denying legislative immunity to the Council Members is unreported; it is reproduced in P. App. at 11a-15a. The district court's memorandum opinion denying reconsideration of its original opinion and order also is unreported. It is reproduced in P. App. at 16a-19a.

## JURISDICTION

On December 15, 1987, the Third Circuit entered judgment affirming the district court's denial of absolute immunity to the Council Members. Although no final order has been entered by the district court, the Third Circuit's consideration of the denial of absolute immunity falls within the "collateral order" doctrine of this Court under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). *See Mitchell v. Forsyth*, 472 U.S. 511 (1985). Based on the Third Circuit's entry of judgment, this Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

## STATUTE INVOLVED

42 U.S.C. § 1983. Civil action for deprivation of rights:

> Every person who, under color or any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Con-

gress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT OF THE CASE

At the December 9, 1985 regularly scheduled meeting of the Dallastown Borough Council, the Council Members participated in a vote to disband the Dallastown police force to be effective December 31, 1985. Among those present and participating were members of the Council, Robert Chronister, Lloyd Ferree, Franklin Henry, Ruth Marshall, Merele Shirey and James Schroeder, as well as Vernon McKinsey, the Mayor of Dallastown Borough who presided over the meeting. Voting in favor of disbanding the police force were Council Members Ferree, Henry and Marshall; voting against disbanding the police department were Council Members Shirey and Schroeder.[2]

Following the disbandment of the police force, the Police Officers filed a civil action in the York County, Pennsylvania Court of Common Pleas which was removed to the United States District Court for the Middle District of Pennsylvania. In their Amended Complaint, the Police Officers alleged four claims: state law claims for wrongful discharge; state law claims for civil conspiracy; state law claims for loss of consortium; and federal civil rights claims based on alleged

2. Although Mayor McKinsey and Council Member Chronister did not vote on the disbandment decision, they were named as defendants because they actively supported in the decision.

violations of 42 U.S.C. §§ 1983 and 1985 and the First, Fifth and Fourteenth Amendments of the United States Constitution. The district court has disposed of all claims except for the state law claims for civil conspiracy against the Council Members, and the federal civil rights claims based on 42 U.S.C. § 1983 against Dallastown Borough and the Council Members.

The Council Members filed a motion for summary judgment contending that they were immune from suit under the doctrine of legislative immunity. On December 23, 1986, the district court entered an order denying the Council Members' motion. In so doing, the district court held that the Council Members were entitled to absolute legislative immunity but only for those acts which were procedurally correct under state law. In holding that the Council Members were not individually immune from federal damages claims for their participation in the disbandment decision, the court reasoned:

> The Borough Council merely voted on a motion to disband the Police Force. If the Council had passed an ordinance and conformed with all the necessary prerequisites, 53 P.S. §§ 46006, 46008, they would have been acting in a legislative capacity and would have been entitled to the legislative immunity. *Aitchison v. Raffiani*, 708 F.2d 96 (3d Cir. 1983). However, Council only *voted* on a motion to disband the Police Force, and were attempting to effect a legislative act without enacting an ordinance. Therefore, their vote was invalid. The council is *not* entitled to absolute legislative immunity for their actions. . . .

P. App. at 13a-14a (emphasis in original).

The Council Members then moved for reconsideration of the district court's opinion, but on May 22, 1987, the district court denied that motion, and reaffirmed that, "in order to be acting in a legislative capacity a municipality must follow mandated state procedure." P. App. at 18a.

The Third Circuit affirmed the district court that the abolition of the police force by vote, rather than through the enactment of an ordinance, did not constitute legislative activity under state law. Judge Mansmann, writing for the court, opined that "the passing of an ordinance was necessary to cloak the council members with the protection of legislative immunity." Finding support in state law that immunity attaches only to a borough council's exercise of its legislative powers through the enactment of an ordinance, the court declared that, "if an act is accomplished by means of other than an ordinance, it is not an exercise of legislative activity. . . [and] the doctrine of absolute immunity does not attach." P. App. at 7a-8a.

## REASONS FOR GRANTING THE PETITION

The decision of the Third Circuit is in direct conflict with decisions of this Court which require the application of federal law - not state law - to determine whether absolute immunity insulates individual legislators from federal damages claims. In short, this Court never has permitted state law to define or limit the defenses to such claims. Rather, this Court has made clear that, "[w]hen federal law is the source of the plaintiff's claim, there is a federal interest in defining

the defenses to that claim, including the defense of immunity." *Ferri v. Ackerman*, 444 U.S. 193, 198 n.13 (1979). The decision below also is in direct conflict with other circuit courts of appeal which have recognized the supremacy of federal law governing questions of absolute immunity regarding federal damages claims. Finally, the decision below is of imperative importance to the public whose municipal officials necessarily will be inhibited from the discharge of their legislative duty for the public good as a result of the decision below.

## A. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THIS COURT'S APPLICATION OF FEDERAL LAWS TO IMMUNITY QUESTIONS FOR FEDERAL DAMAGES CLAIMS.

### 1. The Third Circuit's Resort To State Procedural Law Conflicts With This Court's "Functional" Approach To Immunity Law.

The decision below specifically held that the availablility of the immunity defense depends on whether the action taken was procedurally correct under state law regardless of whether the function was an act legislative in character. That decision directly conf licts with decisions of this Court which consistently was held that the immunity defense does not depend on procedural form. Beginning with *Tenney v. Brandhove*, 341 U.S. 367 (1951), and continuing with *Forrester v. White*, 56 U.S.L.W. 4067 (U.S. Jan. 12, 1988), this Court has developed

an extensive body of federal, common-law principles regarding immunity law which adopts a uniform "functional" approach to determining whether certain activity is immunized from federal damages claims. The defense of absolute immunity has been limited to legislators, judges, and prosecutors when they directly engage in the "function" accorded protection. *Harlow v. Fitzgerald*, 457 U.S. 800, 807-808 (1982). Under the functional approach, the courts should "examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted" and "evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions." *Forrester v. White*, 56 U.S.L.W. at 4068. Simply stated, certain officials are entitled to absolute immunity "because of the special nature of their responsibilities." *Butz v. Economou*, 438 U.S. 478, 511 (1978).

This Court has recognized absolute immunity for state legislators from civil suit for what they say or do as legislators based on the common law's consistent recognition of such immunity which as "taken as a matter of course by our Nation's founders." *Tenney v. Brandhove*, 341 U.S. at 376. The recognition of absolute immunity for state legislators in *Tenney* reflected this Court's interpretation of federal law and did not depend on "any particular set of state rules or procedures available to discipline erring legislators. Rather, the rule of that case recognizes the need for immunity to protect the 'public

good.' " *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 404 (1979). The policy considerations and reasoning expressed in *Tenney* was considered equally applicable to regional legislators in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. at 405.[3] The Third Circuit extended absolute immunity to municipal governing officials in *Aitchison v. Raffiani*, 708 F.2d 96 (3d Cir. 1983). There, the court extended absolute immunity to members of a municipal council, a mayor, and a borough attorney when they exercised legislative functions.

However, this Court has not "articulat[ed] a precise and general definition of the class of acts entitled to immunity." *Forrester v. White*, 56 U.S.L.W. at 4069. Nevertheless, absolute immunity generally applies to those situations in which individual legislators act in a field "where legislators traditionally have power to act." *Tenney v.*

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*3. Although the question of whether individuals performing legislative functions at the purely local level was expressly reserved in Lake Country*, 404 U.S. at 404 n.26, the various courts of appeal considering the question have concluded that the policy considerations and reasoning expressed in *Tenney* justify the extension of absolute immunity to local legislators as well. *See e.g. Bruce v. Riddle*, 631 F.2d 272 (4th Cir. 1980) (county council members); *Minton v. Bernard Parish School Board*, 803 F.2d 129 (5th Cir. 1986) (local school board members); *Reed v. Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983) (mayor, local liquor control commissioner and Village Board of Trustees); *Runs After v. United States*, 766, F.2d 347 (8th Cir. 1985) (Tribal Council members); *Cinevision Corp. v. City of Burbank*, 745 F.2d 560 (9th Cir. 1984) (city council members); and *Espanola Way Corp. v. Meyerson*, 690 F.2d 827 (11th Cir. 1982), *cert. denied*, 460 U.S. 1039 (1983) (city commissioners).

*Brandhove*, 341 U.S. at 378. At a minimum, absolute legislative immunity protects activities which are "an integral part of the deliberative, communicative processes by which legislators participate in proceedings related to consideration and passage or rejection of legislation," including voting. *Gravel v. United States*, 408 U.S. 606, 624-25 (1972). Determination of "[w]hether actions. . .are, in law and fact, an exercise of legislative power depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect.' " *INS v. Chadha*, 462 U.S. 919, 952 (1983) (citation omitted) (emphasis added).

Legislative functions are not confined merely to the passing of legislation. In *Tenney*, this Court favorably quoted Massachusetts Chief Justice Parsons as follows:

> 'I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; *but will extend it to the giving of a vote*, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office; and I would define the article as securing to every member exemption from prosecution, for everything said or done by him, as a representative, in the exercise of the functions of that office, *without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules.*'

*Id.*, 341 U.S. at 374, quoting *Coffin v. Coffin*, 4 Mass. 1, 27 (1808) (emphasis added).

Here, the court of appeals ignored the functional approach to absolute immunity in favor of a procedural approach under state

law. It concluded that legislative immunity depended neither upon the legislative function nor the effect the denial of immunity would have on the exercise of such function; rather, the court concluded that immunity depended on the procedural correctness of the act under state law. However, in focusing solely upon the regularity of the decision, the court of appeals misapprehended the nature of the inquiry.

2. The Decision Below Conflicts With This Court's Interpretation and Application Of 42 U.S.C. § 1988.

Although this Court has considered state law in providing a rule of decision in federal civil rights claims, it has occurred only in limited circumstances and consistent with 42 U.S.C. § 1988.[4]

The language of § 1988 directs the courts to follow "a three-step process" in determining the rules of decision

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4. Title 42 U.S.C. § 1988 provides, in relevant part:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title 'CIVIL RIGHTS,' and of Title 'CRIMES,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. . . .

applicable to civil rights claims:

> First, courts are to look to the laws of the United States 'so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect.' [42 U.S.C. § 1988.] If no suitable federal rule exists, courts undertake the second step by considering application of state 'common law, as modified and changed by the constitution and statutes' of the forum state. *Id.* A third step asserts the predominance of the federal interest: courts are to apply state law only if it is not 'inconsistent with the Constitution and laws of the United States.' *Ibid.*" *Burnett v. Grattan*, 468 U.S. 42, 47-48 (1984).

*Wilson v. Garcia*, 471 U.S. 261, 267 (1985).

This Court has cautioned that the mandate of 42 U.S.C. § 1988 "implies that resort to state law - the second step in the process - should not be undertaken before principles of federal law are exhausted." *Wilson v. Garcia*, 471 U.S. at 268. This exhaustion requirement also is supported by the third instruction in § 1988, that "state law shall only apply 'so far as the same is not inconsistent with' federal law. *Ibid.* This requirement emphasizes the 'predominance of the federal interest' in the borrowing process, taken as a whole." *Id.*, quoting *Burnett v. Grattan*, 468 U.S. at 47. In short, "Congress surely did not intend to assign to state courts and legislatures as conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action" under the civil rights statutes. *Id.*, 471 U.S. at 269.

This same reasoning prevails for immunity questions. *See Martinez v. State of California*, 444 U.S. 277, 283-84 (1980) (state immunity statute for parole officials does not control claims brought under 42 U.S.C. § 1983 even though asserted in state court). " 'The immunity claim raises a question of federal law.' " *Id.*, 444 U.S. at 284 n.8, quoting *Hampton v. Chicago*, 484 F.2d 602, 607 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974).

Thus, resort to state procedural law in the presence of governing principles of federal law clearly conflicts with this Court's interpretation of the Congressional dictate found in 42 U.S.C. § 1988.

## B. THE THIRD CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH DECISIONS OF THE OTHER CIRCUITS UPHOLDING THE SUPREMACY OF FEDERAL LAW FOR IMMUNITY QUESTIONS.

The Third Circuit stands alone in holding that state procedural requirements control the question of whether the exercise of certain functions should be immunized under federal law. For example, in *Hampton v. Chicago*, 484 F.2d at 608, the Seventh Circuit held that:

> In view of overriding importance of federal law, the area of [a state prosecutor's] protection cannot be either limited or expanded by a state's statutory definition of his authority or responsibility; we therefore do not pause to review the respective parties' analysis of the relevant Illinois statute.

Relying on this Court's holding in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. at 404, that absolute immunity does not depend "on any particular set of state rules or procedures

available to discipline erring legislators," the Eighth Circuit likewise rejected consideration of any particular system of institutional checks and balances contained in local statutes. *Gorman Towers, Inc. v. Bogoslovsky*, 626 F.2d 607, 612 (8th Cir. 1980).

In a related context, this approach was applied by the District of Columbia Circuit Court of Appeals in *Jayvee Brand, Inc. v. United States*, 721 F.2d 385 (D.C. Cir. 1983), where a federal damages suit was brought against, *inter alia*, individual members of the federal consumer product safety commission. There, a federal regulation was amended in the absence of required public notice and comment. Even though the court found that the commission had failed to follow the procedural requisites to amend the regulation at issue, it, nevertheless, held that the regulation was "in substance what it was in form: an exercise of quasi-legislative power." *Id.* Consequently, the individual members of the commission were immune from suit.

Thus, the approach used by other courts of appeals recognizes the supremacy of federal immunity principles established by this Court. Unlike the Third Circuit, other circuit courts do not look to state procedural law to determine if the particular function should be immunized. Therefore, the conflict presented by the Third Circuit's decision is clear and requires resolution by this Court.

### C. THIS CASE IS OF IMPERATIVE IMPORTANCE TO THE PUBLIC.

The decision below clearly is destructive of the federal policy underlying legislative immunity to protect the "public good."

The "public good" recognized in *Tenney* was described as follows by Mr. Justice Frankfurter:

> Legislators are immune from deterrants to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in *Fletcher v. Peck*, 6 Cranch 87, 130, 3 L.Ed. 162, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned.

*Tenney v. Brandhove*, 341 U.S. at 377.

As this Court recognized in *Forrester v. White*, when officials are threatened with personal liability for acts taken pursuant to their official duties, they probably will act with an excess of caution or not act at all.

> Suits for monetary damages are meant to compensate the victims of wrongful actions and to discourage conduct that may result in liability. Special problems arise, however, when government officials are exposed to liability for damages. To the extent that the threat of liability encourages these officials to carry out their duties in a lawful and appropriate manner and to pay their victims when they do not, it accomplishes exactly what it should. By its nature,

> however, the threat of liability can create perverse incentives that operate to inhibit officials in the proper performance of their duties. In many contexts, government officials are expected to make decisions that are impartial or imaginative, and that above all are informed by considerations other than the personal interests of the decisionmaker. Because government officials are engaged by definition in governing, their decisions will often have adverse affects on other persons. When officials are threatened with personal liability for acts taken pursuant to their official duties, they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct. In this way, exposing government officials to the same legal hazards faced by other citizens made detract from the rule of law instead of contributing to it.

*Id.*, 56 U.S.L.W. at 4068.

Given these concerns, it is clear that the Third Circuit's decision creates a serious threat to the effective administration of municipal governments. Boroughs in Pennsylvania are not the only municipalities affected by this decision. All of the municipalities in Pennsylvania have similar limitations placed upon legislative powers. *See* PA. STAT. ANN. tit. 53, §§ 12521 (every legislative act of a city of the first class shall be by ordinance or resolution); § 22230 (every legislative act of the second class city council shall be by resolution or ordinance); and § 36010 (every legislative act of the third class city council shall be by resolution or ordinance). Similarly, New Jersey requires that the legislative powers of counties shall be exercised by ordinance, except for the exercise of specifically named powers which are required to be or, are permitted to be, exercised by resolution. *See* N.J. STAT. ANN. § 40:41A-79 (West 1987).

If the Third Circuit's decision is allowed to stand, citizens are at great risk that their municipal legislators will be deterred from acting for the public good. The threat of personal liability resulting from the exercise of legislative functions which might be procedurally irregular manifestly will skew the decision-making focus on form over substance.

## CONCLUSION

By deciding that legislative immunity is implicated solely by adherence to state procedural rules regardless of the function exercised, the Third Circuit departed from this Court's functional approach to immunity questions and violated the dictates of 42 U.S.C. § 1988. Whether the Council Members adhered to correct state procedures in their participation in the vote to disband the Dallastown Police Department is irrelevant to the determination of whether immunity attaches to their participation in that legislative function. This Court should exercise its authority here to bring the decision of the Third Circuit in harmony with the scheme of absolute immunity outlined by this Court and applied by the various other circuit courts to avoid the risk of harm to the public affected by this decision.

For the foregoing reasons, this Petition for a Writ Certiorari should be granted.

Respectfully submitted,

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# APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 87-5409

---

DONIVAN, WILLIAM C. and
DONIVAN, KAY E., his wife;
GOHN, BRADLEY J. and
GOHN, KRISTINE, his wife;
ADAMS, KENNETH L. and
ADAMS, SHIRLEY M., his wife;
TROUT, RICHARD K. and
TROUT, KENALEE, his wife

vs.

DALLASTOWN BOROUGH;
McKENZIE, VERNON;
FERREE, LLOYD;
CHRONISTER, ROBERT;
MARSHALL, RUTH; and
HENRY, FRANKLIN, all individually
and as elected officials,

*Appellants*

---

Appeal from the United States District
Court for the Middle District
of Pennsylvania - Scranton
(D.C. Civil No. 86-0277)

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Submitted Under Third Circuit Rule 12(6)
December 1, 1987
Before: WEIS, HIGGINBOTHAM,
and MANSMANN, *Circuit Judges.*
(Filed December 15, 1987)

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## OPINION OF THE COURT

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MANSMANN, *Circuit Judge.*

This is an appeal from an order of the district court denying a motion for reconsideration of a previous order which refused to grant summary judgment on behalf of the defendants, Dallastown Borough Council and its individual members, based upon the defense of absolute legislative immunity. We will affirm the district court's order, agreeing that the abolishment of the local police force, accomplished by vote rather than by enactment of an ordinance, was not a proper exercise of council's legislative powers entitling its
munity from suit for damages brought pursuant to 4
(1982) by the plaintiffs, members of the Dallastown
their wives.

I.

Following heated labor negotiations between council members and police officers, on December 9, 1985, the Borough Council formally voted to abolish the Dallastown Police Department. A contract with a neighboring community was negotiated to provide police protection for the community, necessarily resulting in the employment termination of the present police officers.

The police officers commenced suit against the Borough, the former mayor, and the members of the Borough Council seeking damages based upon various state law claims and federal civil rights violations as theories for recovery. The complaint was initially filed in the Court of Common Pleas of York County, but was removed to the U.S. District Court for the Middle District of Pennsylvania. After motions to dismiss and requests for summary judgment were decided, what remained for consideration were the state law claims alleging a civil conspiracy as to the individual council members and the federal claims under § 1983 against the Borough and its members.[1] The Borough and the council members moved for summary judgment, asserting legislative immunity.

The district court denied the council members' motion for summary judgment, holding that the failure to pass an ordinance to effectuate the disbanding of the police force precluded characterizing their action as legislative, thus refusing them the protection of legislative immunity. A motion for reconsideration was likewise denied. This appeal followed.

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1. An amended complaint was later filed, asserting additional § 1983 violations of constitutional rights in collective bargaining, arbitration and entitlement to pension benefits. The plaintiffs requested summary judgment on all of these claims which motion, to date, remains undisposed of and is not involved in this appeal.

II.

When a district court rejects a motion to alter or amend a judgment,[2] our standard of review is whether the district court abused its discretion. The district court's exercise of discretion, however, must be within the limits of the law, and if the decision denying the motion is based on legal error, our review of the matter is plenary. *Adams v. Gould, Inc.*, 739 F.2d 858 (3d Cir. 1984).

This appeal presents a purely legal question concerning the scope of the immunity doctrine as it applies to certain legislative activity,[3] namely, whether legislative immunity is implicated by adherence to legislative procedures, regardless of the character of the action taken.

III.

In *Tenney v. Brandhove*, 341 U.S. 367, *reh'g denied*, 342 U.S. 843 (1951), the Supreme Court declared that individual legislators acting in their traditional legislative activity are absolutely immune from a suit for damages under 42 U.S.C. §§ 1983 and 1985. This grant of immunity was extended to regional legislators in *Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), with the proviso that the immunity attaches to these officials only

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2. Our scope of review of the council members' motion for reconsideration of the denial of legislative immunity is equivalent to a review of a Fed. R. Civ. P. 59(e), motion to alter or amend a judgment. Although Rule 59 does not explicitly mention motions for reconsideration, we have previously held that for purposes of Fed. R. App. P. 4(a), concerning appeals of civil cases as a right, a motion for reconsideration qualifies as a motion under 59(e). *First Jersey National Bank v. Dome Petroleum, Ltd.*, 723 F.2d 335 (3d Cir. 1983).

3. Our jurisdiction to entertain this appeal is outlined in *Forsyth v. Kleindienst*, 729 F.2d 267, 271 (3d Cir. 1984):

> The denial of a claim of absolute immunity is an interlocutory order appealable under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

when functioning in a comparable capacity to that of members of the state legislature. *Id.* at 406. Our decision in *Aitchison v. Raffiani*, 708 F.2d 96 (3d Cir. 1983), extended absolute immunity to individuals acting in a legislative capacity at a purely local level, an issue expressly left open in *Lake County*.

Since not all activity by council members is "legislative," the focus of this appeal is the mode in which the Dallastown council members allegedly exercised legislative authority, *i.e.*, whether the abolition of the police force by vote, rather than through enactment of an ordinance, represented activity within a legislative capacity allowing the immunity to attach.

Dallastown Borough, situated in Pennsylvania, operates under the Pennsylvania Borough Code, which describes a borough's legislative powers as follows:

> The legislative powers of boroughs. . .shall be exercised by or be based on an ordinance. All other powers shall be exercised by vote of the majority of council present at the meeting unless otherwise provided. . .53 Pa. C. S. A. § 46006(3) (1966) (amended 1980).

The ordinance procedure requires publication of the text of the proposed ordinance with advertisement at least seven (7) days prior to its adoption by the council. In addition, the matter must be presented to the mayor for approval. If the mayor vetoes the ordinance, a two-thirds vote of council is necessary for enactment. 53 Pa. C.S.A. § 46006(1)-(4), § 46007. A borough's establishment of a police department is authorized by 53 Pa. C.S.A. § 46121, which dictates that the creation of the force be accomplished by enactment of an ordinance.

The council members argue that if the municipality has the power to create the police force, it also has the power to abolish the same. They claim that regardless of how the abolishment was effected, they possessed the authority to accomplish it, and that any decision in this matter is necessarily undertaken in a legislative capacity, notwithstand-

ing procedural irregularities. Accordingly, failure to enact an ordinance was, at most, a procedural error not so divergent as to divest the members of legislative immunity. To hold otherwise would be to exalt form over substance.

The council members posit of the fundamental distinction between a borough's actions of a legislative character and those of a proprietary or managerial character, citing *Almy v. Borough of Wilkinsburg*, 53 Pa. Comm. 46, 49-50, 416 A.2d 638, 640 (1980). In *Almy*, the Pennsylvania Commonwealth Court differentiated between the two as follows: an act which applies generally to the community is a legislative matter where an act directed at one or a few individuals is an executive act. *See Kuchka v. Kile*, 634 F. Supp. 502 (M.D. Pa. 1985). The council members argue that under this standard, disbanding the police force was a policy decision permanently affecting the entire community and representing a legislative act for which they are entitled to immunity.

The police officers contend that our decision in *Abraham v. Pekarski*, 728 F.2d 167 (3d Cir. 1984), controls the question of legislative immunity. In *Abraham* we held:

> In Pennsylvania, as in most states, municipal corporations are given by legislation a combination of proprietary, managerial, and legislative powers. It is only with respect to the legislative powers delegated to them by the state legislatures that the members of the governing boards of municipal corporations enjoy legislative immunity. . . . Moreover, since municipal corporations have been delegated legislative authority only within strictly defined statutory limits, they can only act legislatively when following the statutory procedures specified for such action. *See Philadelphia Presbytery Homes, Inc. v. Board of Comm'rs*, 440 Pa. 299, 306-09, 269 A.2d 871, 874-75 (1970). The fact that the action complained of resulted from a vote of the members of the governing body is not dispositive, for in the exercise of non-legislative powers all corporate bodies require a vote of their governing bodies.

*Id.* at 174. Citing this language, the officers conclude that the borough's failure to follow the mandated ordinance procedure was fatal to the claim to legislative immunity.

The officers also cite the facts, as pled in their complaint, regarding the personal animosity between the parties as indicative that the abolishment of the police force was not accomplished within the sphere of legislative activity.

In its original denial of summary judgment, the district court, relying upon *In Re Appeal from Ordinance No. 384 of the Borough of Dale*, 33 Pa. Comm. 430, 382 A.2d 145 (1978), found that an ordinance is necessary to effectuate the dissolution of the force, and then concluded that the failure to enact the same removed the matter from within the sphere of legislative activity. Since the council only voted on a motion to disband, the district court held that this method was invalid to perfect a legislative act. The absence of a legislative act predetermined legislative immunity, and, thus, summary judgment was denied.

On the motion for reconsideration council members argued that the district court had erroneously relied on the proposition that the failure to follow procedural requirements precluded the council from acting legislatively. The court rebutted the appellants' contention that an action impacting on the community as a whole is legislative in character, by noting that such a construction would permit council to transact all its business by vote and avoid compliance with the Borough Code. Finding this to be an unacceptable result, the court restated its position that the municipality must enact an ordinance in order to be considered as functioning in a capacity which would confer legislative immunity.

We agree with the district court's finding that the passing of an ordinance was necessary to cloak the council members with the protection of legislative immunity. While we might question whether *In Re Ordinance No. 384* expressly holds that an ordinance is necessary to accomplish abolishment or whether it merely stands for the prop-

osition that the borough may disband by ordinance, we need not address this as we find support for our decision within the language of the Borough Code itself.

We have previously referred to § 46006(3) delineating the duties of borough councils as follows: "The legislative powers of boroughs. . .shall be exercised by or be based on ordinance." Likewise we have described case law which clearly outlines that in order for immunity to attach, the action must be legislative in nature. *See Abraham, supra.* In consideration of these authorities, the result is simply stated: legislative powers require enactment of an ordinance; if an act is accomplished by means other than an ordinance, it is not an exercise of legislative activity. Therefore, the doctrine of absolute immunity does not attach.

We dispute the council members' argument that this decision represents a form-over-substance conclusion. The ordinance procedure exists for a purpose. The publication requirement gives notice to the community of impending legislative activity and, where, as here, the community will certainly be affected by the council's actions, the rationale for publication is an important consideration. The council members themselves have encouraged us to consider that their abolishment of the police force impacted the community in a permanent nature. This is one of the best reasons for requiring passage by an ordinance and for the withholding of legislative immunity if the proper procedures are not followed.

Another aspect of the ordinance procedure requiring comment is the veto right by the mayor. Voting to abolish the police force bypassed this requirement, thereby over-stepping the local scheme of "checks and balances." This activity represents a further departure from the sphere of legitimate legislative activity by the council members.

Accordingly, we will affirm the district court's denial of summary judgment based upon the lack of legislative immunity of the council members.

A True Copy:
Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 87-5409

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DONIVAN, WILLIAM C. and
DONIVAN, KAY E., his wife;
GOHN, BRADLEY J. and
GOHN, KRISTINE, his wife;
ADAMS, KENNETH L. and
ADAMS, SHIRLEY M., his wife;
TROUT, RICHARD K. and
TROUT, KENALEE, his wife

vs.

DALLASTOWN BOROUGH;
McKENZIE, VERNON;
FERREE, LLOYD;
CHRONISTER, ROBERT;
MARSHALL, RUTH; and
HENRY, FRANKLIN, all individually
and as elected officials,

APPELLANTS

---

Appeal from the United States District Court
for the Middle District of Pennsylvania - Scranton
(D.C. Civil No. 86-0277)

---

Present: WEIS, HIGGINBOTHAM AND MANSMANN,
Circuit Judges

## JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was submitted under Third Circuit Rule 12(6) December 1, 1987.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, entered December 23, 1986 and May 22, 1987, be and the same are hereby affirmed. Costs taxed against the appellants.

ATTEST:
SALLY MRVOS
*Clerk*

December 15, 1987

Certified As A True Copy and Issued In Lieu
Of A Formal Mandate on January 6, 1988.

Test: M. ELIZABETH FERGUSON
*Chief Deputy Clerk, U.S. Court of Appeals*
*For The Third Circuit*

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| WILLIAM C. DONIVAN; | : | CIVIL ACTION NO. 86-0277 |
| BRADLEY J. GOHN; | : | |
| KENNETH L. ADAMS and | : | |
| RICHARD K. TROUT, | : | |
| Plaintiffs | : | |

v.

DALLASTOWN BOROUGH; VERNON McKINSEY; LLOYD FERREE; ROBERT CHRONISTER; RUTH MARSHALL and FRANKLIN HENRY, Individually and as elected officials,
Defendants

## MEMORANDUM

### Procedural Background

Before this court is a Motion for Summary Judgment of the individual defendants McKinsey, Feree, Chronister, Marshall and Henry, based on the doctrine of legislative immunity. By Order of court dated September 30, 1986, granting defendants' Motion to Dismiss, the only claims remaining are: (1) the state law claims for civil conspiracy as to the individual defendants; and (2) the federal civil rights violations based on 42 U.S.C. §1983 as to all defendants.

### Factual Background

Plaintiffs Donivan, Gohn, Adams and Trout were members of the Dallastown Borough police force and members of a collective bargaining unit represented by the Dallastown Police Association (Association). The Association had a collective bargaining agreement with Dallastown Borough effective January 1, 1984 to December 31, 1985. At all times between December 1, 1984 and December 31, 1985, defendants Chronister, Ferree, Henry and Marshall were duly elected or appointed members of the Dallastown Borough Council (Council)

and defendant McKinsey was the duly appointed Mayor of Dallastown Borough. When plaintiffs attempted to negotiate the terms of a new agreement, they met with no success. In August 1985, the Borough refused the contract offer made by the Association. On August 27, 1985, the Association notified the Borough that it wished to submit the matter to arbitration. Subsequently, on September 9, 1985, the Council voted on and accepted a new agreement containing different terms than those offered by the Police Association which was not signed by the Police Association.

The Borough then contracted with York Township for police services. On November 29, 1985, the Association notified the Borough of their withdrawal of the arbitration request, and attempted to accept the last contract offer of the Borough. The Borough, however, refused to acknowledge the acceptance. On December 9, 1985, the Borough Council voted to abolish the Police Department as of December 31, 1985, and contract with York Township for police services. Defendant Chronister presided over the regular meeting of the Council on December 9, 1985. Among those present and participating in the meeting of December 9, 1985 were defendants Chronister, McKinsey, Ferree, Henry and Marshall as well as Council members Merle Shirly and James Schroeder.

Discussion

The defendants argue as a basis for their summary judgment motion that the individual defendants are absolutely immune from suit based on the doctrine of legislative immunity. Summary judgment may only be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. In addition, the record must be viewed in the light most favorable to the party opposing the motion.

The defendants argue that they were local officials carrying out a legislative function when they voted to disband the police force and therefore they cannot be held liable for a legislative act because the

doctrine of legislative immunity serves to shield then from liability. Initially, the court notes that the doctrine of legislative immunity literally includes U.S. Congress members via the Speech and Debate Clause of the U.S. Constitution and has been judicially extended to state legislators. Tenney v. Brandhove, 341 U.S. 367, 377 (1951). More recently the Supreme court extended absolute legislative immunity to regional legislators in Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 405 (1979). However, the Court seemed to indicate that absolute legislative immunity would only cover those acts which were legislative in character. Id. at 406.

The Third Circuit Court of Appeals held that "members of a municpal council acting in a legislative capacity are absolutely immune from damage suits under section 1983." Aitchison v. Raffiani, 708 F.2d 96, 99 (3d Cir. 1983) (emphasis added). The Court of Appeals also held that, "to the extent their activities are legislative in character," the mayor and the borough attorney were entitled to share in the legislative immunity. Id. However, this court's inquiry is not ended because one issue remains: whether the acts of the Borough Council members and Mayor McKinsey were legislative in character.

As stated by the Third Circuit Court of Appeals,

> [i]n Pennsylvania, as in most states, municipal corporations are given by legislation a combination of proprietary, managerial, and legislative powers. It is only with respect to the legislative powers delegated to them by the state legislatures that the members of governing boards of municipal corporations enjoy legislative immunity. Necessarily, therefore, the first inquiry with respect to the application of such immunity must be whether those claiming it were performing delegated legislative, rather than proprietary or managerial, functions. Moreover, since municipal corporations have been delegated legislative authority only within strictly defined statutory limits, they can only act legislatively when following the statutory procedures specified for such action. See Philadelphia Presbytery Homes, Inc. v.

> Board of Comm'rs., 440 Pa. 299, 306-09, 269 A.2d 871, 874-75 (1970). The fact that the action complained of resulted from a vote of the members of the governing body is not dispositive, for in the exercise of non-legislative powers all corporate bodies require a vote of their governing bodies.

Abraham v. Pekarski, 728 F. 2d 167, 174 (3d Cir. 1984).

Dallastown Borough functions under the Borough Code, 53 P.S. §45101 to §48501 (Purdon 1966). The corporate powers of Boroughs are set forth in Article XII of the Borough Code. As stated in the Borough Code, "[t]he powers of the borough shall be vested in the corporate authorities." 53 P.S. §46202 (Purdon Supp. 1986). Further the code states, "[t]he legislative powers of boroughs including capital expenditures not payable out of current funds, shall be exercised by or be based on an ordinance. All other powers shall be exercised by vote of the majority of council present at a meeting, unless otherwise provided." 53 P.S. §46006 (Purdon Supp. 1986).

The Borough Code very clearly indicates that to create a police force, an ordinance must be passed. 53 P.S. §46121. Thus, the creation of a police force is a legislative act. However, the Borough Code is silent on the issue of dissolution of a police force. This court cannot suggest that an ordinance is required to remove a person from his or her position with the police force. Almy v. Borough of Wilkensburg, 53 Pa.Commw. 46, 51, 416 A.2d 638, 640 (1980). However, where a borough seeks to disband or dissolve the entire existence of a police force then an ordinance effecting its dissolution is required. In re Appeal from Ordinance No. 384 of the Borough of Dale, 33 Pa.Commw. 430, 438, 382 A.2d 145, 148 (1978) (borough council acted within scope of its power when it abolished its police force by ordinance).

The facts in the instant case clearly indicate that no ordinance was passed to disband the Dallastown Police Force. The Borough Council merely voted on a motion to disband the Police Force. If the

Council had passed an ordinance and conformed with all the necessary prerequisites, 53 P.S. §§46006, 46008, they would have been acting in a legislative capacity and would have been entitled to legislative immunity. Aitchison v. Raffiani, 708 F.2d 96 (3d Cir. 1983). However, Council only voted on a motion to disband the Police Force, and were attempting to effect a legislative act without enacting an ordinance. Therefore, their vote was invalid. The council is not entitled to absolute legislative immunity for their actions and their Motion for Summary Judgment must be denied.

SYLVIA H. RAMBO
*United States District Judge*

Dated: December 23, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| WILLIAM C. DONIVAN; | : | CIVIL ACTION NO. 86-0277 |
| BRADLEY J. GOHN; | : | |
| KENNETH L. ADAMS and | : | |
| RICHARD K. TROUT, | : | |
| Plaintiffs | : | |
| v. | | |
| DALLASTOWN BOROUGH; VERNON McKINSEY; | | |
| LLOYD FERREE; ROBERT CHRONISTER; | | |
| RUTH MARSHALL and FRANKLIN HENRY, | | |
| Individually and as elected officials, | | |
| Defendants | | |

ORDER

In accordance with the accompanying Memorandum, IT IS HEREBY ORDERED THAT the individual defendants' Motion for Summary Judgment is denied.

SYLVIA H. RAMBO
*United States District Judge*

Dated: December 23, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| WILLIAM C. DONIVAN; | : | CIVIL ACTION NO. 86-0277 |
| BRADLEY J. GOHN; | : | |
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| RICHARD K. TROUT, | : | |
| Plaintiffs | : | |
| v. | | |
| DALLASTOWN BOROUGH; VERNON McKINSEY; LLOYD FEREE; ROBERT CHRONISTER; RUTH MARSHALL and FRANKLIN HENRY, all individually and as elected officials, | | |
| Defendants | | |

## MEMORANDUM

### Procedural Background

On December 23, 1986 this court denied the motion for summary judgment of Vernon McKinsey, Lloyd Feree, Robert Chronister, Ruth Marshall and Franklin Henry ("individual defendants"). On January 8, 1987 individual defendants filed a motion for reconsideration of this court's order of December 23, 1986. On January 22, 1987 individual defendants filed their brief in support of the motion for reconsideration. On February 9, 1987 plaintiffs filed their brief in opposition to defendants' motion for reconsideration, to which defendants replied on February 24, 1987. The motion is now ripe for consideration.

### Discussion

Motions for reconsideration serve the limited function of correcting manifest errors of law or fact or presenting newly discovered evidence. Keene Corp. v. International Fidelity Insurance Co., 561 F.Supp. 656, 665 (N.D.Ill. 1983), aff'd 736 F.2d 388 (7th Cir. 1984).

As stated by the Illinois District Court,

> [s]uch motions cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during pendency of the summary judgment motion (citations omitted). The non-movant has an affirmative duty to come forward to meet a properly supported motion for summary judgment. . . Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time.

Keene Corp. v. International Fidelity Insurance Co., 561 F.Supp. 656, 665-66 (N.D.Ill. 1983); see also Publishers Resource, Inc. v. Walker-Davis Publications, Inc., 762 F.2d 557, 561 (7th Cir. 1985).

In their motion to reconsider defendants argue that this court erroneously relied on the proposition that the failure to follow procedural requirements precludes a borough council's actions from being legislative in nature. The defendants argue that regardless of procedural irregularities, a borough council's actions are legislative in nature if the substance of its actions are general in nature and effect the community as a whole, rather than specific in nature, effecting individuals. Thus, defendants are entitled to absolute legislative immunity for the action of the council in voting to abolish its police department which was legislative in nature. Defendants merely reiterate the arguments made in their initial briefs on this issue.

Legislative immunity does not extend to legislators for everything they do. Immunity applies only to legislative action taken in the sphere of legitimate legislative activity. . . . Tenney v. Brandhove, 341 U.S. 367 (1951). Further, in order to be acting in a legislative capacity a municipality must follow mandated state procedure. Abraham v. Perarski, 728 F.2d 167 (3d Cir. 1984). Defendants attempt to build an argument that if the council was taking action, by any method, and the result or impact was on the community as a whole, that the action is legislative in character and thereby affords immunity to the individual defendants. Following that logic however, a borough council could conduct all of its business by vote, acquire legislative immunity for

those acts later deemed legislative in character, and totally avoid compliance with the borough code, which requires the passing of an ordinance in order to be acting in a legislative capacity. However, as stated previously in this court's opinion dated December 23, 1986, the legislative powers of boroughs shall be exercised by or be based on an ordinance.[1]

In accordance with this court's prior opinion and the above discussion, a municipality must enact an ordinance in order to be acting in a legislative capacity and to confer legislative immunity on the borough council. Therefore, individual defendants' motion for reconsideration must be denied. An appropriate order will issue.

SYLVIA H. RAMBO
*United States District Judge*

Dated: May 22, 1987

1. "The legislative powers of boroughs including capital expenditures not payable out of current funds, shall be exercised by or be based on an ordinance. All other powers shall be exercised by vote of the majority of council present at a meeting, unless otherwise provided." 53 P.D. §46006 (Purdon Supp. 1986).

IN THE UNITED STATES COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| WILLIAM C. DONIVAN; | : | CIVIL ACTION NO. 86-0277 |
| BRADLEY J. GOHN; | : | |
| KENNETH L. ADAMS; and | : | |
| RICHARD K. TROUT, | : | |
| Plaintiffs | : | |
| v. | | |
| DALLASTOWN BOROUGH; VERNON McKINSEY; LLOYD FEREE; ROBERT CHRONISTER; RUTH MARSHALL and FRANKLIN HENRY, all individually and as elected officials, | | |
| Defendants | | |

ORDER

In accordance with the accompanying memorandum, IT IS HEREBY ORDERED THAT individual defendants' motion for reconsideration is denied.

SYLVIA H RAMBO
*United States District Judge*

Dated: May 22, 1987

Supreme Court, U.S.
FILED
APR 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1540

In The
# Supreme Court of the United States
October Term, 1987

VERNON McKINSEY, LLOYD FERREE, ROBERT CHRONISTER, RUTH MARSHALL AND FRANKLIN HENRY, ALL INDIVIDUALLY AND AS ELECTED OFFICIALS,

*Petitioners,*

v.

WILLIAM C. DONIVAN, BRADLEY J. GOHN, KENNETH L. ADAMS AND RICHARD K. TROUT,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether Borough Council members may invoke absolute legislative immunity when they abolish a police department by voice vote and not by preparing, advertising and voting upon a written ordinance where state law expressly provides: "*The legislative powers of Boroughs . . . shall be exercised by or be based upon an ordinance.* All other powers shall be exercised by vote of the majority of council present at a meeting, unless otherwise provided." Act of February 1, 1966, P.L. No. 851, 1006; 53 P.S. § 46006(3). (Emphasis added)

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## STATEMENT OF THE CASE

On August 27, 1985, police officers employed by the Borough of Dallastown invoked the mandatory arbitration procedures established by state law to solve the impasse caused by the inability of the Borough and the police to agree upon a labor contract.

Following the demand for arbitration, the Borough, on September 9, 1985, voted on and purported to accept an agreement which contained different terms than those offered by the police. The police would not accept the contract.

When negotiations were resumed on September 16, 1985, the police requested additional benefits different from those requested at the last negotiating session. The Borough officials felt the police "were selling them short and were acting in bad faith."

The labor negotiations were complicated by three (3) factors.

The first factor was a desire on the part of two (2) Borough Council members to get rid of Chief of Police Donivan (a member of the bargaining unit) because "He had too much power" and because the Chief had testified against the Borough in a civil rights action involving the death of two (2) Borough employees.

The second complicating factor was the avowed position of the Borough officials that "If the police exercise their right to seek arbitration, then the police department would be abolished and a neighboring township would be contacted to provide police protection for the Borough of Dallastown."

The last factor was that both the Chief of Police and another Borough police officer testified against the Borough of Dallastown in a second civil rights action during the end of the bargaining period. Their testimony contributed to a jury verdict of $372,000.00 that was returned against the Borough of Dallastown on October 25, 1985.

The jury verdict ignited the increasingly volatile situation.

Following the jury verdict of October 25, 1985, the police, realizing that their jobs were to be abolished, notified the Borough of their desire to accept the last contract offer of the Borough and to withdraw the arbitration request.

The Borough Council refused to accept the contract offer and abolished the police department on December 9, 1985.

No Ordinance was drafted, advertised or adopted in the abolition of the police department.

The Borough officials did not provide the police officers with a hearing prior to the termination of their employment.

The police officers commenced suit against the Borough, the former Mayor and the members of the Borough Council seeking damages based upon various state law claims and federal civil rights violations.

The Borough Council members defend their actions on the basis of absolute legislative immunity.

———o———

## SUMMARY OF ARGUMENT

### THE DECISION BELOW DOES NOT CONFLICT WITH PRINCIPLES ESTABLISHED BY THE UNITED STATES SUPREME COURT OR OTHER FEDERAL COURTS

1. The Court of Appeals recognized that local officials to be acting in the "legitimate scope of legislative activities" and thereby entitled to absolute immunity must comply with the Pennsylvania Enabling Act. The Act requires the legislative powers of Boroughs to be exercised by or be based upon an Ordinance.

A simple voice vote on a matter brought before a Borough does not constitute "legitimate legislative activity."

The Pennsylvania Ordinance procedure exists for a valid purpose. It gives notice to the community of the effect of impending legislative activity. It also assures that the mayor can exercise a veto on the legislation which is an important part of the "checks and balances" in the local scheme of government.

The "functional" approach argued by the Petitioner does not permit the immunization of activity "unlawful from the very beginning."

## THE DECISION OF THE THIRD CIRCUIT PROVIDES FULL PRTECTION TO THE PUBLIC GOOD

By complying with the Pennsylvania statute which requires that legislative activity be based upon an Ordinance, local officials are given absolute immunity. *Aitchison v. Raffiani*, 708 F.2d 96 (3rd Cir. 1983). The decision of the Third Circuit Court of Appeals is in complete harmony with the other decisions of this Court by encouraging local officials to comply with law.

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## ARGUMENT

### REASONS FOR DENYING THE WRIT

### A. THE DECISION BELOW IS NOT IN CONFLICT WITH THIS COURT'S APPLICATION OF FEDERAL LAW TO IMMUNITY QUESTIONS FOR FEDERAL DAMAGES CLAIMS.

1. The United States Third Circuit Court of Appeals did not create a conflict with this Court's "functional approach" to immunity law by improperly adopting state procedural law as argued by the Petitioner. On the contrary, the Court simply held that to be "acting legislatively" in Pennsylvania Borough Council members must follow the Pennsylvania law which requires all Boroughs when acting legislatively to prepare, advertise and vote upon an Ordinance.

Dallastown Borough, like all Boroughs in Pennsylvania, was formed under and is controlled by the Borough

Code which limits a Borough's legislative powers as follows:

> The *legislative powers of Boroughs . . . shall be exercised by or be based upon an Ordinance.* All other powers shall be exercised by vote of the majority of counsel present at a meeting, unless otherwise provided . . . Act of February 1, 1966, P.L. No. 581, 1006; 53 P.S. § 46006(3). (Emphasis added)

The Ordinance procedure requires publication of the text of the proposed Ordinance with advertisement at least seven (7) days prior to its adoption by the Council. In addition, the matter must be presented to the Mayor for approval. If the Mayor vetoes the Ordinance, a two-thirds vote of Council is necessary to enactment. Act of February 1, 1966, P.L. No. 581, 1006, 1007; 53 P.S. § 46006(1)-(4), 46007, as amended. A failure to follow the requisite procedures renders the enactment void for illegality. *Lancaster City Ordinance Case,* 383 Pa. 471, 119 A.2d 307 (1956).

The District Court found that no Ordinance was passed to disband the Dallastown police force and that the Borough Council merely voted on a motion to disband the police force. (See Petitioner's Appendix, p. 14A.)

Without an Ordinance there was no legislation for the Council to consider. The power exercised by the Council, whether considered to be administrative, proprietary, managerial, because of the absence of an Ordinance, was not legislative.

The District Court correctly held that the question of legislative immunity was controlled by *Abraham v. Peakarski,* 728 F.2d 167 (3rd Cir. 1984):

> In Pennsylvania, as in most states, municipal corporations are given by legislation a combination of proprietary, managerial and legislative powers. It is only with respect to the legislative powers delegated to them by the State Legislature that the members of governing Boards of municipal corporations enjoy legislative immunity. P. 174.

As further noted by the District Court, legislative immunity does not extend to legislatures for everything they do. Immunity only applies to legislative action taken in the sphere of "legitimate legislative activity." *Tenney v. Brandhove*, 341 U.S. 367, 95 L.Ed.2d 1019, 71 S. Ct. 783 (1951).

It is submitted that in Pennsylvania the "legitimate sphere of legislative activity" requires a municipality to follow the state mandated procedure to be "acting legislatively."

Petitioners argues, however, that under the "functional" approach, both the District Court and the Court of Appeals were wrong in holding that under Pennsylvania law an Ordinance is necessary for the legitimate exercise of legislative powers.

The basis of absolute legislative immunity has from the beginning depended upon whether the person seeking such immunity was acting "in the sphere of legitimate legislative activity." No case cited by the Defendants or decided by any Federal Court has determined that illegitimate or unlawful activity can be the basis for absolute legislative immunity. This Court has specifically held that absolute legislative immunity only applies where officials are acting in a capacity "comparable to that of members of a state legislature." *Lake County Estate v. Tahoe*

*Planning Agency,* 440 U.S. 391, 406, 59 L.Ed.2d 401, 99 S. Ct. 1171 (1979).

Municipal corporations, unlike state legislatures, have limited legislative powers. They are permitted to exercise only those powers granted by the Legislature. Before a "functional" test should be applied in ascertaining the applicability of absolute immunity, it must be determined whether or not "the function" is within legal limits.

A municipal government cannot function beyond the powers granted it by the Legislature. Municipal legislation enacted by voice vote and without complying with the Ordinance procedure is a nullity.

To provide municipal officials with absolute legislative immunity in performing acts that are not permitted by Pennsylvania law facilitates no valid public purpose and is inconsistent with reasons for the "functional test" outlined by the Petitioners.

In *Forrester v. White,* 56 U.S.L.W. 4067 (1988), this Court has acknowledged that:

> Officials who seek exemptions from personal liability have the burden of showing that such an exemption is justified by overriding consideration of public policy . . . Even here, (discussing absolute immunity under the speech or rebate clause), however, the Court has been careful not to extend the scope of protection farther than its purposes require . . . *Id.* at 4068.

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1 While the question of whether absolute immunity extended to individuals acting in a legislative capacity at the purely local level was left open in *Lake County Estates,* such immunity was extended to local officials by the Third Circuit Court of Appeals in *Aitchison v. Raffiani,* 708 F.2d 96 (3rd Cir. 1983).

> Absolute immunity, however, is "strong medicine" justified only when the danger of [officials being] defected from the effective performance of their duties is very great. *Id.* at 4070.

The instant case is a perfect example of when absolute legislative immunity should not be granted.

There is no danger of municipal officials being deflected from the effective performance of their duties. They may legislate with complete impunity as long as they stay "within the law." As noted by the District Court:

> . . . If the Council had passed an Ordinance and conformed with all the necessary prerequisites, 53 P.S. §§ 46006, 46008, they would have been acting in a legislative capacity and would have been entitled to legislative immunity. *Aitchison v. Raffiani*, 708 F.2d 96 (3rd Cir. 1983).

The Court of Appeals also observed:

> We dispute the Council members' argument that this decision represents a form over substance conclusion. The Ordinance procedure exists for a purpose. The publication requirement gives notice to the community of impending legislative activity and where, as here, the community will certainly be affected by the Council's actions, the rationale for publication is an important consideration. The Council members themselves have encouraged us to consider that their abolishment of the police force impacted the community in a permanent nature. This is one of the best reasons for requiring passage by an Ordinance and for the withholding of legislative immunity, if the proper procedures are not followed.
>
> Another aspect of the Ordinance procedure requiring comment is the veto by the Mayor willing to abolish the police force bypassed this requirement thereby overstepping the local scheme of "checks and bal-

ances." This activity represents a further departure from the sphere of legitimate legislative activity by the Council members.

The "functional" approach to absolute immunity should not immunize activity "unlawful from the very beginning." The opinion of the Court of Appeals is in harmony with this Court's prior decision on absolute legislative immunity.

2. The Court of Appeals' decision does not conflict with this Court's interpretation and application of 42 U.S.C. § 1988.

In this second argument, the Petitioners attempt to characterize the limited grant of legislative power by the Pennsylvania Legislature to Boroughs, as a "state procedural law", that conflicts with federal law.

It is submitted that the statute is a substantive limit on the legitimate sphere of legislative activity on the municipal level. There is nothing inconsistent with the Constitution, and laws of the United States (*Bernett v. Jaratten*, 468 U.S. 42, 47, 48, 82 L.Ed.2d 36, 104 S.Ct. 2924 (1984) (cited by the Petitioners) to mandate a procedure requisite for the valid exercise of legislative power by a local government.

The three (3) step process set forth in 42 U.S.C. § 1988 is unaffected. Federal law is not affected. Full and absolute legislative immunity is recognized in Pennsylvania. *Aitchison v. Raffiani*, 708 F.2d 96 (3rd Cir. 1983). The state law simply limits the legislative powers of municipal corporations and designs the "sphere of legitimate legislative activity."

## B. THE THIRD CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISION OF OTHER CIRCUIT COURTS OF APPEALS.

The Petitioners argument that the Third Circuit decision is in direct conflict with decisions of other Circuit Courts is simply not true.

The Petitioners' argument that the Pennsylvania state "procedural requirements" for Boroughs somehow limit federal immunity law is novel, but unsupported by either relevant precedent or logic.

A Borough official may not exercise any legislative power unless it is pursuant to the adoption of an Ordinance. The Act limits the legislative power granted to Boroughs:

> The *legislative powers of Boroughs . . . shall be exercised by or be based upon an Ordinance.* All other powers shall be exercised by vote of the majority of counsel present at a meeting, unless otherwise provided . . . Act of February 1, 1966, P.L. No. 581, 1006; 53 P.S. § 46006(3). (Emphasis added)

No federal case has ruled that such a limitation of power granted to municipal corporations is either unreasonable or unlawful.

Petitioners' argument suggests that a state legislature must delegate or be held to have delegated full legislative powers to a municipal corporation otherwise Federal Immunity law is violated.

This argument overlooks the reason for rule. Absolute immunity only applies when it serves the public

good. *Tenney v. Brandhove,* 341 U.S. 367, 64 L.Ed.2d 237, 71 S. Ct. 783 (1951). Forcing state legislatures to abrogate their role as the supreme source of state law and forcing them to delegate unlimited power to municipal corporations so that under federal law local officials who have violated the limits of their delegated powers will have absolute immunity, does not serve the public good. Such a result encourages wrongful doing and is inconsistent with the guidelines set down by this Court in *Forrester v. White,* 56 U.S.L.W. 4062 (1988).

### C. THE DECISION OF THE THIRD CIRCUIT PROVIDES FULL PROTECTION TO THE PUBLIC GOOD.

In its final argument, Petitioners claim that this case is of imperative importance to the public because it deals with the need to protect the public good.

In support of its argument that the opinion of the Third Circuit Court of Appeals does not promote the public good, it cites the case of *Forrester v. White,* 56 U.S.L.W. 4062 (1988), as follows:

> Suits for monetary damages are meant to compensate the victims of wrongful actions and to discourage conduct that may result in liability. Special problems arise, however, when governmental officials are exposed to liability for damages. *To the extent that the threat of liability encourages these officials to carry out their duties in a lawful and appropriate manner, and to pay the victims when they do not, it accomplishes exactly what it should* . . . . P. 4068 (Emphasis added)

Petitioners seem to ignore the specific language in *Forrester* which establishes when immunity should not be

recognized. While it is true that many municipalities, including all those in Pennsylvania and those in New Jersey, do have limited grants of legislative power, these powers, when lawfully exercised, provide absolute legislative immunity to the local officials. The instant opinion of the Third Circuit Court of Appeals not only protects the public good by recognizing that absolute immunity when exercised "in the sphere of legitimate legislative activity," it also assures that local officials are encouraged to carry out their duties in a lawful and appropriate manner.

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## CONCLUSION

Both the United States District Court and the United States Court of Appeals for the Third Circuit recognized the need to deny the Borough officials absolute immunity in this case.

The extraordinary method used by the officials in abolishing the police department was borne of animosity and nurtured by a personal desire to retaliate for lawful conduct by the police employees that was wrongfully perceived to be improper. Legislative power was wielded arbitrarily and in violation of the "checks and balances" established for local government.

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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